No. 20,914

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 12,
Respondent.

RESPONDENT'S PETITION FOR A REHEARING

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Comes now respondent above-named and, pursuant to rule 23 of the Rules of this court, hereby petitions for a rehearing of this cause and, in support thereof, states the following grounds therefor:

1. The opinion (Slip, page 2) is incorrect in stating that ". . . registered *members of the union* have first preference of dispatch." (Italics supplied.) The record shows that first preference of dispatch is given to longshoremen registered under the PMA-ILWU contract, without regard to union membership. In order not to have this court's opinion reflect an inaccuracy in so important a matter, the opinion should at least be corrected.

2. The opinion (Slip, page 4) does not state that the meeting of the joint committee on October 21, 1964, was the next regularly scheduled meeting after the three casuals spoke with Ferguson on October 13,

1964, although the record shows that it was. This is important as negativing any thought that the parties to the contract—including respondent—were in any way dilatory in the processing of the grievance.

3. The opinion (Slip, page 5) states that the trial examiner concluded that the charging parties were made aware by respondent "that they could not expect employment *unless they became members of the union and remained in good standing",* and again (Slip, page 7) that, "the effect of such discrimination, the trial examiner could reasonably conclude, was to *encourage them to join the union in order to obtain work assignments."* The opinion also states (Slip, page 7) that respondent is chargeable with knowledge that its action would tend to encourage the three casuals *"to become union members".* (Italics supplied.)

All of this is contrary to the record. The trial examiner's decision contains no such conclusions and, if it had, they would have been totally unsupported by any evidence. The complaint made no such charges and the Board made no such contentions in this court.

4. The opinion (Slip, page 6) states that even though the casuals were disrupting the operations of the dispatching hall, "they should have been advised to this effect and asked to desist." There is nothing in the National Labor Relations Act which requires a jointly-employed dispatcher to give such advice, or to make such a request, before asking disruptive persons to leave a jointly-operated dispatching hall. By imposing such a requirement on the joint collective

bargaining agent, the court is reading something into the Act which is not there—it is in effect imposing upon collective bargaining representatives and employers a condition which Congress did not see fit to enact. It also opens a Pandora's Box: how clear or firm must the "advice" be, how many times must the "request" be made? To impose such a test is to encourage disruptive tactics in labor relations.

5. The opinion (Slip, page 9) ignores respondent's reliance upon this court's recent opinion in *National Labor Relations Board v. Tanner Motor Livery, Ltd.,* 349 Fed. 2d 1, on the grounds that the activities of the casuals did not constitute a strike or work stoppage, and that respondent did not contend before the Board that alternative grievance procedures were available.

The opinion is in error on both counts.

(a) If, contrary to this court's holding in the *Tanner Motor Livery, Ltd. (supra)* action, the applicable law is to be found in *National Labor Relations Board v. Illinois Bell Telephone Company,* 189 Fed. 2d 124, and *C. G. Conn. Ltd. v. National Labor Relations Board,* 180 Fed. 2d 390, then it is clear that, as respondent asserted in brief and oral argument, the three casuals were never employees and therefore the Act is not applicable to them. It should be noted that, in the *Illinois Bell Telephone Company and C. G. Conn* cases, the courts of appeal *refused to enforce* a Board order precisely because the charging parties were not employees. (That is why it was held that their action did not constitute a strike.) If the action of the charging parties here is held not to constitute a

strike because they were not employees, then, equally, *the Act is not applicable to them.*

(b) Furthermore, it is not correct to state that the argument was not the basis of any objection in the agency proceeding. The record before the trial examiner shows that the question of grievance procedure and its exhaustion in lieu of filing charges with the Board was thoroughly covered (see e.g., 47, 50-1, 59-60, 77-8, 83 [cross-examination by respondent established the failure to exhaust available grievance machinery], 84-5, 90-1, 103-5, 137-9, 140, 141 [respondent took position that the three casuals were entitled to have their grievances processed under the contract], 143 [and that only the filing of the instant charge prevented this], 146-8 [the issue of the grievance machinery was just about the only testimony from this defense witness], 150-1 [idem]. In its briefs to both the trial examiner and the Board, respondent asserted:

> "... instead of waiting for the Joint Labor Relations Committee procedure to resolve the controversy, they took self-help in the form of causing a disruption in the dispatching hall . . . In the meantime, the Joint Labor Relations Committee was investigating the alleged grievance . . . and while considering it at its next meeting, the union members thereof were served with the unfair labor practice charges in this very case. Thereupon, the employer members refused to proceed any further . . ."

The trial examiner's decision contains a complete discussion of this matter and shows that the issue was raised. The respondent's very first exception to the

trial examiner's decision was to its failure to find that respondent's president had advised the casuals "that the joint labor relations committee, not the union, had the responsibility for correcting grievances relating to dispatching." Therefore, contrary to the opinion, this question was in fact presented to the agency.

In any case, this court's decision in *Tanner Motor Livery, Ltd., supra,* was not published until after September, 1965, when the exceptions to the trial examiner's report were filed and, therefore, if there was a failure initially to raise the point as sharply as it was raised after this court's decision, that failure is clearly excusable under the provisions of Section 10(e) of the Act.

For the foregoing reasons, it is respectfully prayed that the petition for rehearing be granted.

Dated, San Francisco, California,
May 10, 1967.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
By NORMAN LEONARD,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL

Pursuant to the provisions of Rule 23 of the Rules of this court, I hereby certify that, in my judgment, the annexed petition for rehearing is well founded and that it is not interposed for delay.

NORMAN LEONARD.